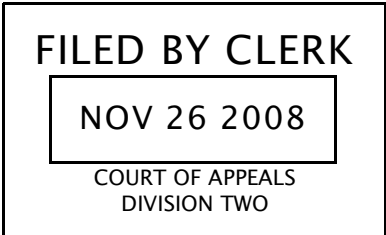


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|-----------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | |
| |) | |
| Respondent, |) | 2 CA-CR 2008-0122-PR |
| |) | DEPARTMENT A |
| v. |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| DANIEL DEWAYNE GUDE, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070988

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Daniel Dewayne Gude

Florence
In Propria Persona

PELANDER, Chief Judge.

¶1 Petitioner Daniel Dewayne Gude challenges the trial court’s summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. Absent a clear abuse of discretion by the trial court, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 Pursuant to a plea agreement, Gude was convicted of aggravated robbery. The trial court sentenced him to an aggravated, thirteen-year prison term. As he does in his petition for review, Gude argued below that the trial court lacked an adequate factual basis to accept his plea. In dismissing the petition, the trial court found that the grand jury transcript supplied a factual basis for Gude’s commission of the offense of aggravated robbery. This pro se petition for review followed.

¶3 On review, Gude does not suggest that he involuntarily or unknowingly pled guilty. *See* Ariz. R. Crim. P. 17.3; *State v. Rubiano*, 214 Ariz. 184, ¶ 11, 150 P.3d 271, 274 (App. 2007). But he again contends the trial court erred in “accept[ing] [his] plea of guilt for aggravated robbery without establishing a factual basis for every element of the offense” and claims he was therefore entitled to post-conviction relief. *See* Ariz. R. Crim. P. 32.1(a).

¶4 “Before entering judgment on a guilty plea, the trial court must determine whether a factual basis exists for each element of the crime to which defendant pleads.” *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994); *see also* Ariz. R. Crim. P. 17.3 and 26.2(d). The factual basis need not be found beyond a reasonable doubt, but rather may be established by “strong evidence” of guilt. *State v. Ellison*, 169 Ariz. 424, 426, 819 P.2d 1010, 1012 (App. 1991). That evidence “may be derived from any part of the record

including presentence reports, preliminary hearing transcripts, or admissions of the defendant.” *Salinas*, 181 Ariz. at 106, 887 P.2d at 987; *see also State v. Johnson*, 181 Ariz. 346, 349, 890 P.2d 641, 644 (App. 1995).

¶5 As noted above, Gude pled guilty to the charge of aggravated robbery, which one commits by committing robbery with the “aid[] [of] one or more accomplices actually present.” A.R.S. § 13-1903(A).

A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

A.R.S. § 13-1902(A). An accomplice is one “who with the intent to promote or facilitate the commission of an offense . . . [s]olicits or commands another person to commit the offense; . . . [a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense[; or] . . . [p]rovides means or opportunity to another person to commit the offense.” A.R.S. § 13-301.

¶6 Thus, contrary to Gude’s argument that his codefendant could have been an accomplice only if she actually made threats or used force and thereby “*assist[ed] in threatening or using force against any person,*” in fact, Gude’s codefendant only needed to have aided him in threatening the victim or using force against her, or provided him the “means or opportunity” to do so. *See* §§ 13-301, 13-1902(A), 13-1903(A). The record before the trial court provided a sufficient factual basis to support a finding that Gude’s

codefendant had aided him.¹ As the court pointed out, the codefendant got into the victim's car, "called the victim expletives," thereby "intimidating her," and "told [Gude] that the victim was trying to get the keys [back] from [Gude]." The codefendant also admitted that she had been "present as part of this and was in the vehicle." Likewise, at his change-of-plea hearing, Gude acknowledged that "another person . . . was actually there" with him when he committed the offense.

¶7 Gude argues, however, that "[t]he term 'actually present' refers to someone involved in the robbery, not just someone who is with a person who decides to commit a robbery." Indeed, a person's "mere presence" at the scene of a robbery is insufficient to prove that he or she acted as an "actually present" accomplice. *See State v. Lee*, 142 Ariz. 210, 219, 689 P.2d 153, 162 (1984); *see also* § 13-1903(A). But, in *State v. Villegas*, 101 Ariz. 465, 467, 420 P.2d 940, 942 (1966), our supreme court found that a defendant had aided his codefendants in a robbery, despite not having taken any violent action himself, when he had watched the others commit the robbery and had said nothing, had fled with the others, and had subsequently been arrested with them. Thus, although something more than mere presence is required for one to be deemed an accomplice, the person need not have actively participated in the violence personally in order to be an accomplice.

¹In the minute entry from Gude's change-of-plea hearing, the trial court noted that it "incorporate[d] the Grand Jury transcript and testimony of [the adult victim] as further factual basis" for the plea. The record does not reflect what testimony the court was referring to, but as discussed below, we find a sufficient factual basis for the plea in the grand jury transcript.

¶8 We find misplaced Gude’s reliance on *State v. Herrera*, 174 Ariz. 387, 850 P.2d 100 (1993), to support a contrary conclusion. In that case, our supreme court found there was sufficient evidence to show Herrera had committed aggravated robbery when his alleged accomplice “was physically present and participating in the scuffle.” *Id.* at 393-94, 850 P.2d at 106-07. But the *Herrera* court did not rule that another person must in all situations commit acts of violence themselves in order to be an “actually present” accomplice for purposes of § 13-1903(A).

¶9 Here, as detailed above, Gude’s codefendant did not merely watch him rob the victim but also encouraged him, warned him that the victim was trying to recover the keys to the vehicle, and cursed at the victim before leaving with Gude in the victim’s vehicle. Thus, there was sufficient evidence to show Gude had committed the robbery with an accomplice “actually present” and hence to support his guilty plea. *See Villegas*, 101 Ariz. at 467-68, 420 P.2d at 942-43. Accordingly, although we grant the petition for review, we deny relief.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge